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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/805,802	03/22/2004	James H. Cink	WMMG 3562.4	9954

321 7590 01/12/2005

SENNIGER POWERS LEAVITT AND ROEDEL  
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ST LOUIS, MO 63102

EXAMINER

ROWAN, KURT C

ART UNIT PAPER NUMBER

3643

DATE MAILED: 01/12/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/805,802

Applicant(s)

CINK ET AL.

Examiner

Kurt Rowan

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 20 October 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-23 is/are pending in the application.
- 4a) Of the above claim(s) 1-14 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 15-23 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date July 15, 2004.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Election/Restrictions***

1. Claims 1-14 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected invention, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in the reply filed on Oct. 20, 2004.
2. Applicant's election with traverse of Group III in the reply filed on Oct. 20, 2004 is acknowledged. The traversal is on the ground(s) that the process of using the product as claimed can not be practiced with another materially different product.. This is not found persuasive because a perforate sidewall could still lead termites to the aggregation base given structure in the container to direct them to the aggregation base. It is not seen that termites would by-pass the aggregation base since it is located in a deeper more secluded part of the apparatus. Applicant has submitted no evidence showing that a perforate sidewall is less effective. As to Groups I and III, applicant argues that the replaceable container does not have separate utility for monitoring and destroying termites. However, given the number of patents that employ only a replaceable container, the replaceable container has utility to destroy termites. Also, if the relationship between the replaceable container and the aggregation base is so fundamental to the invention how can claims be drawn only to the aggregation base without including the replaceable container ? As to Groups II and III, applicant argues that the channel is required to reach the void. This is not correct since one end of the aggregation base could be open so the void would be exposed to termites yielding an

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aggregation base having the shape of a cup or glass. Hence termites would have access to the void without needing a channel.

The requirement is still deemed proper and is therefore made FINAL.

### ***Double Patenting***

3. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

4. Claims 15-23 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-39 of copending Application No. 10/400,773. Although the conflicting claims are not identical, they are not patentably distinct from each other because the same structural elements of the aggregation base are recited. Claims 1, 5, 8, 22, 23, 24, 25, 26, 27, 30 of 10/400,773 recite the same limitations of claims 15-23 of the present invention such as the channels (claim 5), the void (claim 5), the cellulosic material such as wood (claim 5), the plastic (claim 6). Claim 5 of the 10/400,773 application also recites the cylindrical shape of the aggregation base material.

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This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

***Claim Rejections - 35 USC § 112***

5. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

6. Claims 21-23 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 21 is confusing since it compares the aggregation base to itself by stating said aggregation base further comprising a plurality of openings in the sidewall leading into the aggregation base. Should the claim recite that openings in the sidewall lead to the void ?

***Claim Rejections - 35 USC § 102***

7. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

8. Claims 15-23 are rejected under 35 U.S.C. 102(b) as being anticipated by Bishoff et al.

The patent to Bishoff shows a termite bait station 10 in fig. 2 having an aggregation base being attractive to termites and forming an aggregation site for termites. Bishoff shows the aggregation base as the bottom element 72, 80 in Fig. 2 and a replaceable container as the top element 72, 80 positioned within the volume of the station and

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adjacent the aggregation base. The replaceable container may be removed from the apparatus without substantially disturbing the aggregation base. The aggregation base has a generally cylindrical outer surface and at least one void which is taken as the central part of channel 82 which extends through the pest baiting device or aggregation base 80. The void is centrally located within the aggregation base. The outer surface of the aggregation base extends laterally outward to face a subterranean cavity. In reference to claims 19-20, 22-23, Bishoff shows the aggregation base 80 being a cellulosic material such as wood as disclosed in column 7, lines 51-66. The channel 82 that makes up the void has a surface which contains a cellulosic material. In reference to claim 18, since the channel goes through the aggregation base from top to bottom which are part of the outer surface, there are two openings that lead to the centrally located void. In reference to claim 21, Bishoff shows the aggregation base 72 as being a plastic container as disclose in column 7, lines 7-9 with a plurality of openings 74 in the sidewall.

### ***Conclusion***

9. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. The patent Thorne et al. shows another termite bait station having a replaceable cartridge.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kurt Rowan whose telephone number is 703 308-2321. The examiner can normally be reached on Monday-Thursday 6:30-5:00.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Peter Poon can be reached on 703 308-2574. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

A handwritten signature in black ink, appearing to read "Kurt Rowan", with a stylized flourish at the end.

Kurt Rowan  
Primary Examiner  
Art Unit 3643

KR